

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA46/2020**

In the matter between:

FAKAZILE ANNA KHWELA

Applicant

and

TOYOTA SA PROVIDENT FUND

First Respondent

NBC HOLDINGS PROPRIETARY LIMITED

Second Respondent

THE PENSION FUNDS ADJUDICATOR

Third Respondent

Tribunal: H Kooverjie (chair), Mr L Makhubela, Mr G Madlanga

Summary: Section 37C of the Pension Funds Act 24 of 1956 (*“the Pension Funds Act”*) requires that the trustees actively trace dependants and investigate the extent of dependency on the deceased.

DECISION

1. The applicant in this matter, Mrs Khwela, challenged the decision of the Pension Funds Adjudicator (*“PFA”*), third respondent. The PFA upheld the Fund’s allocation of benefits to allocated various family members of the deceased, Mr Khwela.

2. The applicant challenged the Fund’s decision on the basis that its investigation in establishing legal dependency of the beneficiaries, more specifically the

mother of the deceased, his common law wife and four children was inconclusive.

3. The issue for determination was whether the decision of the Pension Fund's Adjudicator was justified? It is trite that section 37C of the Pension Funds Act 24 of 1956 (*"the Act"*) governs the distributions of payment of lumpsum benefits payable on the death of a member of a pension fund, provident fund, provident preservation fund and retirement annuity fund.
4. The Board is statutorily obliged to undertake its own investigation and ensure that there is equitable distribution of the death benefit to the beneficiaries. The locus classicus on this issue is **Sithole v IC Provident Fund & Another** 2002 [4] BPLR 430 PFA, para 24 – 25, where the court held that:¹

"The Board is required to consider inter alia the following factors namely:

- *The age of the dependants;*
- *The relationship with the deceased;*
- *The extent of the dependency;*
- *The wishes of the deceased;*
- *The future earning capacity of the beneficiary;*
- *The amount for available for distribution."*

5. The percentage that the Board would allocate to the various dependants would be based on the children's ages at the time of the deceased's passing.

¹ This principle was also confirmed in **Mohlomi v ICS Provident Fund** [2014] JOL 314420 (PFA)

According to the wishes of the deceased, he nominated his mother, the applicant and five children. Section 37C however limits the testamentary freedom of the deceased, in that the deceased is not able to dispute his death benefits as he wishes. Even though the member usually completes a nomination form, such nomination is not binding as the benefit must be distributed in accordance with Section 37C. See also the matter of **Mashazi**.²

6. Section 37C further requires that trustees actively trace dependants and investigate the extent of their dependency on the deceased member. The Board identified further dependants (14 in total) who were factually dependant on the deceased and proceeded to allocate the benefit accordingly.
7. The Board contended that the applicant's allegations are vague and without substance. The Board submitted that it had conducted its own investigation and allocated the benefits to the children depending on their extent of dependency.
8. The Board persisted with its submissions that its investigation was conclusive and that the evidence was credible. It was further submitted that the affidavits constituted admissible evidence and that sufficient evidence was provided in demonstrating that the persons identified were dependent on the deceased at the date of his death. The Board further advised that the evidence constituted not only affidavits from the potential beneficiaries, but there were interactions and interviews with the parties as well.
9. In particular, the applicant contended that the Board's findings were inconclusive

² **Mashazi v African Products Retirement Benefit Provident Fund** [2002] 8 BPLR 3706 B- D

in relation to legal dependency. It had not been established with certainty whether the deceased was in fact the father of the minor children whose dependency was disputed by her.

10. In order to determine if the Board exercised its discretion as envisaged in the PFA, the test is whether or not the board acted rationally and arrived at a proper and lawful decision?
11. We find that the Pension Funds Adjudicator (“PFA”) properly considered the matter by having regard to the complaint lodged by Mrs Khwela and the submissions made by the Board. The Board’s allocation was largely based on factual dependency. The Pension Funds Act defines the term “*dependant*” broadly. There are three classes of dependants namely legal, factual and future dependants.³
12. In **Makume v Cape Joint Retirement Fund** 2007 2BPLR 17 CC, the High Court found that a death benefit was not subject to the marital property regime of the deceased member.
13. The PFA was correct in its interpretation of section 37C of the Act. We take cognisance of the fact that the Board was entrusted with their duty to trace and

³ “*Dependant in relation to a member means:*
(a) *A person in respect of whom the member is legally liable for maintenance;*
(b) *A person in respect of whom the member is not legally liable for maintenance if such person:*
(i) *Was in the opinion of the Board upon the death of the member in fact dependant on the member for maintenance;*
(ii) *Is a spouse of the member;*
(iii) *A child of the member including a posthumous child and adopted child or a child born out of wedlock.*
(c) *A person in respect whom a member would become legally liable for maintenance had the member not died.”*

identify the beneficiaries of a deceased member, and also exercise its discretionary powers lawfully on the extent of the dependency.

14. We acknowledge further that the Board was required to give proper consideration to relevant factors. It is only in cases where the Board exercised its powers unreasonably and/or improperly and/or unlawfully, can the decision be reviewed.

15. The PFA did not therefore find a basis to interfere with the Board's decision. In this instance the issue of paternity was not the sole determining factor. Even though the Board undertook to determine the extent of "*legal dependency*", its decision on allocating the deceased's dependency was based on factual dependency.

16. At the hearing, the applicant confirmed that she only challenged the dependency claims of the following family members namely:

- Boitameló Sithabile Nkamela
- Sibusiso Emmanuel Msomi
- Sihle Kuhle Bane
- Siphó Bane
- Alex Junior Gwala

17. We take cognisance of the fact that the dependency in respect of the aforesaid dependants was established by the Board. It was established that Alex Junior Gwala was in fact a legal dependant of the deceased. In respect of the other children, the Board relied on the affidavits submitted by the mother of the

deceased, the common law wife and the children who confirmed factual dependency. With regard to Sihle and Siphon, the Board advised that they were in fact residing with the deceased.

18. Cognisance must be taken of the fact that the Board identified the dependants based on the factual dependency test. Siphon and Sihle were born from the deceased's relationship with one of his girlfriends, Ntombizakhe.
19. *De facto* (factual) dependants are those persons to whom the deceased owed no legal duty of financial support but who depended on him financially. The underlying purpose of Section 37C is to ensure that those persons who are dependant on the deceased member are not left destitute after his death, irrespective of whether or not the deceased was legally required to maintain them.
20. There was no concrete evidence placed before the PFA or this Tribunal that would illustrate that the Board made uninformed and incorrect distributions. The deceased not only had a relationship with the applicant, his wife, and common law wife but also his girlfriends with whom he had children. We therefore find that the Board arrived at a proper and lawful decision.
21. In the premises we make the following order:
 - (1) The application for reconsideration is dismissed.

SIGNED at **PRETORIA** on this **26th** day of **FEBRUARY 2021** on behalf of the Panel.

A handwritten signature in blue ink, appearing to read 'H. Koovertjie', written in a cursive style.

ADV H KOOVERJIE SC

With the Panel consisting also of:

L Makhubela

G Madlanga